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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re: JDS UNIPHASE CORPORATION
SECURITIES LITIGATION

No. C-02-1486 CW (EDL)

**ORDER GRANTING DEFENDANT
JDSU'S MOTION TO ALLOW
PARTICIPATION OF CONSULTANT**

This document relates to ALL ACTIONS

On August 22, 2006, Defendant JDS Uniphase filed a motion to allow participation of Deloitte Financial Advisory Services (Deloitte FAS) as Defendant's consultant. Lead Plaintiff had previously raised the issue of a possible conflict of interest that would preclude Defendant's continued use of Deloitte FAS in this case as a consultant on, *inter alia*, Lead Plaintiff's electronic data retention. The motion was fully briefed and the Court held a hearing on September 26, 2006.

Courts apply a two-part test to the issue of disqualification of an expert: (1) whether it was objectively reasonable for the party alleging a conflict of interest to believe that it had a confidential relationship with the challenged expert; and (2) whether that party in fact disclose confidential information to the expert that is relevant to the current litigation. See, e.g., Hewlett-Packard Co. v. EMC Corp., 330 F. Supp. 2d 1087, 1092-93 (N.D. Cal. 2004). Disqualification is inappropriate if either inquiry is answered in the negative. Greene, Tweed of Delaware v. DuPont Dow Elastomers, 202 F.R.D. 426, 429 (E.D. Pa. 2001). The party seeking disqualification has the burden of showing the existence of confidentiality and its non-waiver. Greene, Tweed, 202 F.R.D. at 429 (“Furthermore, the party requesting disqualification may not meet its burden with ‘mere conclusory or *ipse dixit* assertions.’”). In addition to these two inquiries, courts should also consider whether disqualification would be fair to the affected party and would promote the integrity of the legal

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1 process. See Hewlett-Packard, 330 F. Supp. 2d at 1094. Disqualification, however, is a “drastic
2 measure that courts should impose only hesitantly, reluctantly and rarely.” Id. at 1092.

3 Under the first prong of the test, whether a confidential relationship exists, courts should
4 consider

5 whether the relationship was one of long standing and involved frequent
6 contacts instead of a single interaction with the expert, whether the expert
7 is to be called as a witness in the underlying case, whether alleged
communications were from expert to party or vice-versa, and
whether the moving party funded or directed the formation of the opinion
to be offered at trial.
8

9 Hewlett-Packard, 330 F. Supp. 2d at 1093 (quoting Stencel v. Fairchild Corp., 174 F. Supp. 2d 1080,
10 1083 (C.D. Cal. 2001)). Other factors to consider are whether there was a formal confidentiality
11 agreement, whether the expert was retained for litigation, the number of meetings between expert
12 and attorney, whether work product was discussed or documents were provided to the expert,
13 whether the expert was paid, whether the expert was asked to agree not to discuss the case with the
14 opposing party and whether the expert derived any of his specific ideas from work done under the
15 direction of the retaining party. Id. (“The emphasis, as stated above, is not on whether the expert
16 was retained per se but whether there was a relationship that would permit the litigant reasonably to
17 expect that any communication would be maintained in confidence.”).

18 Lead Plaintiff points to the contracts between Deloitte & Touche and its predecessor,
19 Deloitte, Haskins & Sells, to establish that the Connecticut Office of the Treasurer (OTT) had a
20 confidential relationship with Deloitte. Declaration of Catherine LaMarr Ex. A. Some of the
21 contracts contain confidentiality provisions that generally provide that Deloitte & Touche and/or
22 Deloitte, Haskins & Sells promise to treat information provided by OTT as proprietary to the OTT
23 and to hold the information forever in confidence. See, e.g., LaMarr Decl. Ex. A at LP 04286. In
24 particular, Lead Plaintiff points to three contracts that it contends continue through the present day
25 (see LaMarr Decl. Ex. A. at LP 04282, LP 04516, LP 04566), two of which Lead Plaintiff states
26 concern implementation of the computer systems about which Deloitte seeks to provide advice to
27 JDSU. See LaMarr Decl. Ex. A. at LP 04282, LP 04516. The two contracts, however, were entered
28 into many years ago on December 4, 1989 and January 15, 1987, respectively. Although Lead

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1 Plaintiff states that the contract regarding the Master Plan is still open and therefore it is possible
2 that OTT could request work under that contract (see Declaration of Leon Rippel ¶ 9), Lead Plaintiff
3 does not state that it intends to do so. Lead Plaintiff argues that the engagements under the contracts
4 were substantial and performed over many years, and that the relationship has been “attended by
5 frequent contact,” but there is no indication that any work has been undertaken under those contracts
6 recently. In fact, Lead Plaintiff’s declarant says that Deloitte & Touche continued active work on
7 the Master Plan for the OTT only through 1992. Rippel Decl. ¶¶ 4, 5.

8 Moreover, the two contracts relating to computer systems specifically engage Deloitte &
9 Touche and/or Deloitte, Haskins & Sells to “develop an integrated data and imaging processing
10 system for the Second Injury Fund” (LP 04282) and to “expedite the development of an enhanced
11 automated system to replace the current system for recording State receipts and disbursements” (LP
12 04520). Lead Plaintiff has not made a showing that either of these engagements is related to the
13 computer system about which Defendant seeks discovery. Plaintiff contends that Deloitte has been
14 paid over \$1 million dollars for its services rendered pursuant to contracts from 2000 through 2003
15 (see LaMarr Decl. Ex. B), but based on the titles of the contracts in the payment schedule, it is
16 unclear whether any payments have been made on contracts relating to development of computer
17 systems during that time.

18 In addition, there has been no showing that Deloitte FAS will be called as a witness in this
19 case, nor is there any indication that Defendant funded or directed the formation of an opinion to be
20 offered at trial. To the contrary, Defendants engaged Deloitte FAS as a consultant, not as a
21 testifying expert. See Declaration of Sydney Firestone ¶ 1 (“In June 2005, Deloitte FAS accepted an
22 engagement to provide consulting services to Morrison & Foerster LLP (“Counsel”) on behalf of its
23 client, JDS Uniphase Corporation, in connection with certain securities litigation (the
24 “Proceedings”).

25 On balance, Lead Plaintiff has not made a strong showing of a confidential relationship under
26 the first prong of the test. Even assuming *arguendo* that Lead Plaintiff has met its burden of
27 showing a confidential relationship, it has not met its burden under the second prong of the test of
28 showing that OTT disclosed confidential information to Deloitte that is relevant to the current

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1 litigation.

2 Confidential information essentially is “information ‘of either particular significance or [that]
3 which can be readily identified as either attorney work product or within the scope of the attorney-
4 client privilege.’” Hewlett-Packard, 330 F. Supp. 2d at 1094 (quoting Paul v. Rawlings Sporting
5 Goods Co., 123 F.R.D. 271, 278 (S.D. Ohio 1988)); see also Stencel, 174 F. Supp. 2d at 1083
6 (“Courts are more likely to find for the [party seeking disqualification] if any of the following
7 information is shared: legal strategies, the types of experts to be called, the attorney’s views on the
8 relative strengths or merits of a claim or defense, the role of other witnesses at trial or anticipated
9 defenses.”). “Unlike attorney-client communications, discussions between parties or counsel and
10 experts do not carry the presumption that confidential information was exchanged.” Hewlett-
11 Packard, 330 F. Supp. 2d at 1094 (quoting Stencel, 174 F. Supp. 2d at 1083)). Because the burden is
12 on the party seeking to disqualify the expert, that party should point to “specific and unambiguous
13 disclosures that if revealed would prejudice the party.” Id.; see also Greene, Tweed, 202 F.R.D. at
14 430 (“. . . that the proposed experts were involved in the development of technology which was
15 ‘operationally similar’ to the infringing products or ‘which evolved into the [technology] used in the
16 [infringing products] is not enough.”) (quoting Space Systems/Loral, 1995 WL 686369, *2-3)).
17 Conclusory assertions are not enough. Greene, Tweed, 202 F.R.D. 429.

18 None of the information that Lead Plaintiff points to as confidential comes close to
19 constituting attorney work product or falling within the scope of the attorney-client privilege as
20 discussed in the relevant caselaw. There has been no showing that Deloitte and OTT exchanged
21 information about legal strategies under any of the contracts, or that this litigation or any related
22 litigation was pending while Deloitte worked on any aspect of Lead Plaintiff’s computer system,
23 much less that Deloitte personnel discussed with Lead Plaintiff the merits of particular claims or
24 defenses, the role of witnesses at trial or anticipated defenses in this case.

25 Instead, Lead Plaintiff argues that all information given from OTT to Deloitte & Touche and
26 Deloitte, Haskins & Sells during the contractual periods was confidential. Yet Lead Plaintiff has
27 provided no specific disclosures of relevant confidential information. Lead Plaintiff only states that
28 the engagement of Deloitte was to work on the “function and structure of the computer systems for

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1 the OTT, including design of programs for each of the Treasury's 6 divisions," and that "Deloitte
2 designed the entire structure of the OTT computer systems in use to this day." Rippel Decl. ¶¶ 5-6.
3 However, information exchanged during the development of the basic structure of a computer
4 system approximately fourteen years ago would have little relevance today in the context of this
5 litigation. Moreover, Lead Plaintiff's evidence shows that the systems have been upgraded, but does
6 not state whether Deloitte participated in the upgrades. See Rippel Decl. ¶ 7 ("While the
7 programming software and hardware may have been updated, all internal systems currently employ
8 the structure originally designed by Deloitte."). In addition, Ms. La Marr testified that the Pension
9 Fund Management Division is the relevant division of the OTT for this case, and that the Second
10 Injury Fund is separate. Reply Hasu Decl. Ex. B at 46:9-47:5. Therefore, even if Deloitte has
11 confidential information about the Second Injury Fund computer system based on a contract with
12 OTT, that would not be relevant to this action.

13 Lead Plaintiff argues that simply being privy or having access to confidential information in
14 general is enough to satisfy the second prong of the test, citing Space Systems/Loral v. Martin
15 Marietta Corp., 1995 U.S. Dist. LEXIS 22305 (N.D. Cal. Nov. 15, 1995). Space Systems does not
16 stand for that proposition. There, the expert who was disqualified was a former employee of the
17 defendant's predecessor, named inventor of several relevant patents, worked as the head of the group
18 responsible for satellite navigation, had significant involvement in the design of the satellite at issue
19 in that case and continued to consult for the defendant after his retirement. Thus, the expert had
20 access to recent relevant confidential information.

21 By contrast, here, Deloitte's involvement in this case is at least as attenuated as that of the
22 other expert in Space Systems whom the court refused to disqualify. That expert was involved in the
23 development of "operationally similar" earlier versions of the technology at issue and had signed
24 numerous confidential agreements, but his involvement ended fifteen years before and he possessed
25 no confidential information about the technology at issue in the current litigation. Space Systems,
26 1995 WL 686369, *3-4. Similarly, there has been no showing that anyone at Deloitte FAS obtained
27 information from anyone involved in the OTT contracts. Defendant has provided evidence that no
28 person working at Deloitte FAS on this matter has ever had any involvement with the services

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1 provided by any Deloitte entity to OTT, and no person obtained any confidential information from
2 the OTT contracts. Firestone Decl. ¶ 3; Reply Declaration of Sydney Firestone ¶ 1. Except for Ms.
3 Firestone, no person working on this matter was employed by any Deloitte entity before 1996, and
4 she has never been involved in any services provided to the OTT. Reply Firestone Decl. at ¶¶ 2-3.
5 Although one person employed by Deloitte managed projects for the OTT, his employment with
6 Deloitte ended in 1991. Firestone Decl. ¶¶ 5-6. Further, Deloitte searched for documents showing
7 the engagements with OTT in several databases used for identifying conflicts and found no
8 engagements with OTT, although there were some engagements with the State of Connecticut, none
9 of which were related to the OTT or to computer or other information technology services.
10 Firestone Decl. ¶ 4.

11 Lead Plaintiff argues that it need not show that any specific Deloitte personnel acquired
12 information from Plaintiff, and that because of the extensive services performed by Deloitte, the
13 entire organization is disqualified. This argument relies on the imputed disqualification doctrine that
14 applies to attorneys in law firms, but which does not apply to experts. Stencel, 174 F. Supp. 2d at
15 1085 (“The same considerations [regarding imputed disqualification] do not apply to experts, simply
16 because they perform a very different function in litigation than do lawyers. [citation omitted].
17 Attorneys are advocates, charged with selflessly serving their client’s interests. Expert witnesses, on
18 the other hand, are employed to assist the parties in their pretrial preparation, and if called to testify,
19 to give their unbiased opinion in order to assist the trier of fact in understanding the relevant
20 evidence.”).

21 Further, principles of fairness weigh against disqualification in this case. See Hewlett-
22 Packard, 330 F. Supp. 2d at 1094. Here, there are less than six weeks remaining in written fact
23 discovery and only four months until the close of deposition discovery. Lead Plaintiff does not
24 dispute that information about its computer systems is discoverable and there has been no showing
25 that Lead Plaintiff would be prejudiced even if Deloitte had gained some confidential information
26 about those systems. At most, if Lead Plaintiff were correct that Deloitte learned something relevant
27 about its computer system from its prior work, Defendant’s use of Deloitte as a consultant would
28 enable Defendant to discover more effectively information that the Court has ruled that it is entitled

1 to discover. Further, Lead Plaintiff characterizes the discovery into its computer systems as “a
2 sideshow with no conceivable bearing on the serious fraud charges at issue in this case.” Opp’n at
3 13:10-11; n. 7.

4 On balance, even if a confidential relationship did exist between Deloitte and Lead Plaintiff,
5 Lead Plaintiff has not met its burden of demonstrating that confidential information that is relevant
6 to the current litigation was exchanged. Accordingly, Defendant’s motion to allow participation of
7 Deloitte FAS as its consultant is granted.

8 IT IS SO ORDERED.

9 Dated: September 29, 2006

Elizabeth D. Laporte
ELIZABETH D. LAPORTE
United States Magistrate Judge